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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Debra Sue Sallee,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-04504-PHX-DWL

ORDER

15 **INTRODUCTION**

16 Plaintiff Debra Sue Sallee (“Sallee”) seeks review under 42 U.S.C. § 405(g) of the
17 final decision of the Acting Commissioner of Social Security (“Commissioner”), which
18 denied her application for disability benefits and supplemental security income. For the
19 following reasons, the Court finds that the administrative law judge’s (“ALJ”) decision was
20 based on reversible legal error and remands for further proceedings.

21 Sallee is a 50-year-old woman who previously worked as an accounts payable clerk
22 and a customer service representative and alleges she became disabled in March 2013. In
23 2014, she filed applications for disability benefits and supplemental security income. (A.R.
24 198-207.) Her claims were initially denied on June 12, 2014 (A.R. 68-69) and again upon
25 reconsideration on November 18, 2014 (A.R. 98-99). Sallee then filed a written request
26 for a hearing on December 4, 2014. (A.R. 153-154.) On June 15, 2016, she appeared and
27 testified at a video hearing at which an impartial vocational expert also appeared and
28 testified. (A.R. 42-67.) On July 7, 2016, the ALJ issued a decision that Sallee was not

1 disabled within the meaning of the Social Security Act. (A.R. 23-35.) The ALJ's decision
2 became the Commissioner's final decision when the Appeals Council denied Sallee's
3 request for review on October 5, 2017. (A.R. 1-6.)

4 **LEGAL STANDARD**

5 The Court addresses only the issues raised by the claimant in the appeal from the
6 ALJ's decision. *Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). "The ALJ is
7 responsible for determining credibility, resolving conflicts in medical testimony, and
8 resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), *as*
9 *amended on reh'g* (Aug. 9, 2001). The Court should uphold the ALJ's decision "unless it
10 contains legal error or is not supported by substantial evidence." *Orn v. Astrue*, 495 F.3d
11 625, 630 (9th Cir. 2007). "Substantial evidence is more than a mere scintilla but less than
12 a preponderance." *Id.* Put another way, "[i]t is such relevant evidence as a reasonable
13 mind might accept as adequate to support a conclusion." *Id.* (citation omitted). The Court
14 should uphold the ALJ's decision "[w]here evidence is susceptible to more than one
15 rational interpretation," but the Court "must consider the entire record as a whole and may
16 not affirm simply by isolating a specific quantum of supporting evidence." *Id.* (citations
17 and internal quotation marks omitted).

18 "[H]armless error principles apply in the Social Security Act context." *Molina v.*
19 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). "[A]n ALJ's error is harmless where it is
20 inconsequential to the ultimate nondisability determination." *Id.* (citations and internal
21 quotation marks omitted). The Court must "look at the record as a whole to determine
22 whether the error alters the outcome of the case." *Id.* Importantly, however, the Court may
23 not uphold an ALJ's decision on a ground not actually relied on by the ALJ. *Id.* at 1121.

24 To determine whether a claimant is disabled for purposes of the Social Security Act,
25 the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the
26 burden of proof on the first four steps, and the burden shifts to the Commissioner at step
27 five. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At the first step, the ALJ
28 determines whether the claimant is engaging in substantial gainful activity. 20 C.F.R.

1 § 404.1520(a)(4)(i). If so, the claimant is not disabled and the inquiry ends. *Id.* At step
2 two, the ALJ determines whether the claimant has a “severe” medically determinable
3 physical or mental impairment. *Id.* § 404.1520(a)(4)(ii). If not, the claimant is not disabled
4 and the inquiry ends. *Id.* At step three, the ALJ considers whether the claimant’s
5 impairment or combination of impairments meets or medically equals an impairment listed
6 in Appendix 1 to Subpart P of 20 C.F.R. pt. 404. *Id.* § 404.1520(a)(4)(iii). If so, the
7 claimant is automatically found to be disabled. *Id.* If not, the ALJ proceeds to step four.
8 At step four, the ALJ assesses the claimant’s residual functional capacity (“RFC”) and
9 determines whether the claimant is capable of performing past relevant work. *Id.*
10 § 404.1520(a)(4)(iv). If so, the claimant is not disabled and the inquiry ends. *Id.* If not,
11 the ALJ proceeds to the fifth and final step, which addresses whether the claimant can
12 perform any other work based on the claimant’s RFC, age, education, and work experience.
13 *Id.* § 404.1520(a)(4)(v). If so, the claimant is not disabled. *Id.* If not, the claimant is
14 disabled.

15 BACKGROUND

16 At step one, the ALJ found that Sallee met the insured status requirements of the
17 Social Security Act through December 31, 2018 and had not engaged in substantial gainful
18 activity since March 8, 2013, the alleged onset date. (A.R. 25.) At step two, the ALJ found
19 that Sallee had the following severe impairments: bipolar disorder, depression, and anxiety
20 disorder. (A.R. 26.) The ALJ also found that Sallee had the non-severe impairments of
21 interstitial cystitis, obesity, and high blood pressure. (*Id.*) At step three, the ALJ
22 determined that Sallee did not have an impairment or combination of impairments that
23 meets or medically equals the severity of a listed impairment. (A.R. 26-28.) At step four,
24 the ALJ found that Sallee had the residual functional capacity to perform a full range of
25 work at all exertional levels but with the following nonexertional limitations: limited to
26 simple routine and repetitive tasks, with only occasional interaction with the public. (A.R.
27 28-33.) The ALJ further found that Sallee was not capable of performing any past relevant
28 work. (A.R. 33.) At step five, the ALJ found that, considering Sallee’s age, education,

1 work experience, and residual functional capacity, there are jobs that exist in significant
2 numbers in the national economy that Sallee can perform, including janitor and dishwasher.
3 (A.R. 33-34.)

4 Sallee argues that the ALJ's decision is defective for four reasons: (1) the ALJ erred
5 during step four by rejecting Sallee's symptom testimony; (2) the ALJ erred during step
6 four by assigning "great weight" to state agency consultants; (3) the ALJ erred during step
7 two in finding Sallee's interstitial cystitis was not a severe impairment; and (4) the ALJ
8 erred during step five in only limiting Sallee's mental work capacities to work that involves
9 simple, routine, and repetitive tasks. (Doc. 15.)

10 As explained below, the Court agrees with Sallee that the ALJ committed reversible
11 error when evaluating the severity of her interstitial cystitis and when rejecting her
12 symptom testimony. Given these conclusions, it is unnecessary to resolve Sallee's
13 remaining assignments of error, because they pertain to later stages of the five-step process
14 and the ALJ's analysis during those stages may be different on remand.

15 ANALYSIS

16 I. Whether the ALJ Erred in Finding Sallee's Interstitial Cystitis Was Not Severe

17 At step two, the ALJ considers whether the claimant has a "severe disability,"
18 defined as "any impairment or combination of impairments which significantly limits [the
19 claimant's] physical or mental ability to do basic work activities." 20 C.F.R. § 404.1520.
20 "An impairment or combination of impairments can be found 'not severe' only if the
21 evidence establishes a slight abnormality that has 'no more than a minimal effect on an
22 individuals [sic] ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)
23 (citation omitted).

24 The ALJ based her finding that Sallee's interstitial cystitis was not severe on the
25 fact that Sallee was diagnosed with the condition in 2000 and "[t]here is nothing on the
26 record to indicate that [her] Interstitial Cystitis has worsened since the initial diagnosis."
27 (A.R. 26.) The ALJ concluded, therefore, that this condition "ha[d] no more than minimal
28 limitation on her ability to perform basic work activities." (*Id.*)

1 Sallee argues that the ALJ failed to identify any evidentiary support in the record
2 for these conclusions and that the record shows her interstitial cystitis condition did, in fact,
3 get worse following her 2000 diagnosis. (Doc. 15 at 20-21.)

4 The Court agrees with Sallee. The ALJ failed to cite the record in coming to her
5 conclusion that the condition hadn't worsened since 2000, and Dr. Karlovsky wrote in his
6 June 9, 2016 opinion letter that "[f]ecal incontinence has *recently* become more of a
7 concern." (A.R. 1760, emphasis added.) The ALJ later gave Dr. Karlovsky's opinion
8 "partial weight." (A.R. 30-31.) Furthermore, although Sallee testified at the hearing that
9 she was diagnosed in 2000, she also testified that she now has bowel accidents and these
10 "seem[] to be getting more common now." (A.R. 49.) She further testified that she now
11 uses the restroom at least thirteen times a day, at least five of which are bowel movements.
12 (A.R. 60.) Because the vocational expert testified there would be no work available for an
13 individual who needed unscheduled breaks throughout the day (A.R. 65-66), and Sallee's
14 interstitial cystitis symptoms may have required such breaks, there was not substantial
15 evidence supporting the ALJ's conclusion that this condition had no more than a minimal
16 effect on Sallee's ability to work.

17 An error at step two is harmless if the ALJ extensively discusses the condition at
18 step four. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). As discussed below, the
19 ALJ did not properly discredit Sallee's testimony regarding her interstitial cystitis during
20 step four. Therefore, this error was not harmless.

21 II. Whether the ALJ Erred in Rejecting Sallee's Symptom Testimony

22 A. **Legal Standard**

23 "In assessing the credibility of a claimant's testimony regarding subjective pain or
24 the intensity of symptoms, the ALJ engages in a two-step analysis." *Molina*, 674 F.3d at
25 1112. "First, the ALJ must determine whether there is objective medical evidence of an
26 underlying impairment which could reasonably be expected to produce the pain or other
27 symptoms alleged." *Id.* (citations and internal quotation marks omitted). The ALJ found
28 that Sallee had satisfied this first step. (A.R. 29 ["I find that the claimant's medically

1 determinable impairments could reasonably be expected to cause the alleged
2 symptoms”].)

3 If the first step is satisfied, and “there is no evidence of malingering, then the ALJ
4 must give specific, clear and convincing reasons in order to reject the claimant’s testimony
5 about the severity of the symptoms.” *Molina*, 674 F.3d at 1112 (citations and internal
6 quotation marks omitted). Such testimony can’t be rejected simply because it can’t be
7 verified by objective medical evidence. 20 C.F.R. § 404.1529(c)(2) (“[W]e will not reject
8 your statements about the intensity and persistence of your pain or other symptoms or about
9 the effect your symptoms have on your ability to work solely because the available
10 objective medical evidence does not substantiate your statements.”). Here, the ALJ did not
11 find there was evidence of malingering, so she was required to provide “specific, clear and
12 convincing reasons” to reject Sallee’s testimony.

13 “A finding that a claimant’s testimony is not credible must be sufficiently specific
14 to allow a reviewing court to conclude the adjudicator rejected the claimant’s testimony on
15 permissible grounds and did not arbitrarily discredit a claimant’s testimony regarding
16 pain.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (citation and quotation
17 marks omitted). “General findings are insufficient; rather, the ALJ must identify what
18 testimony is not credible and what evidence undermines the claimant’s complaints.”
19 *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (citation omitted); *see also Holohan*
20 *v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001) (“[T]he ALJ must specifically identify
21 the testimony she or he finds not to be credible and must explain what evidence undermines
22 the testimony.”). “[P]roviding a summary of medical evidence in support of a residual
23 functional capacity finding is not the same as providing clear and convincing *reasons* for
24 finding the claimant’s symptom testimony not credible.” *Brown-Hunter*, 806 F.3d at 494.

25 B. Sallee’s Testimony

26 With respect to her bipolar disorder, Sallee testified that it causes foginess and
27 spaciness and makes her anxious and impatient. (A.R. 49, 51, 57.) Additionally, she
28 claimed that it causes lows about once a month lasting for two weeks where she “get[s]

1 that sinking of [her] gut and [she] [doesn't] want to get out of bed.” (A.R. 57.) With
2 respect to her interstitial cystitis, Sallee testified that she “ha[s] pain in [her] pelvic area
3 and mostly in [her] urethra where it feels like [she] ha[s] a urinary tract infection all the
4 time.” (A.R. 49.) She also claimed to have flares of pain “three times a week or so” that
5 would last for a “couple of days” and would prevent her from going about her daily
6 activities. (A.R. 62-63.) She further testified that the condition now causes her to have
7 bowel accidents, and she typically uses the restroom around thirteen times a day, at least
8 five of which are bowel movements. (A.R. 49, 60.)

9 Finally, with respect to her overall capacity to work, Sallee testified that she would
10 be unable to do the jobs that she had done in the past because “[t]hey’re just way to[o]
11 overwhelming for [her]” and the jobs “push[ed] her over the edge.” (A.R. 55.)

12 C. Analysis

13 As explained below, although the ALJ provided somewhat specific reasons for
14 rejecting Sallee’s testimony as it pertained to the symptoms of her bipolar disorder, those
15 reasons were not sufficiently convincing. Additionally, the ALJ did not meaningfully
16 address Sallee’s testimony concerning the symptoms arising from her interstitial cystitis
17 (likely because the ALJ had previously determined this impairment was not severe). These
18 errors were not harmless.

19 As an initial matter, Sallee is incorrect in her assertion (Doc. 15 at 12) that the ALJ
20 simply offered a “boilerplate finding” in support of the decision to reject her symptom
21 testimony, at least as it pertains to her bipolar disorder. Although the ALJ’s order does
22 contain a sentence that might be construed as boilerplate (A.R. 29), that sentence is
23 followed by a fairly detailed discussion of why the ALJ concluded Sallee wasn’t credible
24 on this issue. Specifically, the ALJ relied upon (1) evidence that Sallee’s condition had
25 improved after she started taking bipolar medication (A.R. 29), (2) the incongruity of Sallee
26 being willing to seek full-time employment but being unwilling to consider jobs requiring
27 night or weekend work (A.R. 29-30), and (3) the fact that Sallee had been able to work at
28 various jobs since her bipolar diagnosis (A.R. 30).

1 Nevertheless, Sallee is correct that these proffered reasons were insufficiently
2 convincing—even under the deferential standard of review applicable in this context—to
3 justify the rejection of her testimony. For example, in support of the conclusion that
4 Sallee’s bipolar disorder had improved since she began receiving treatment, the ALJ cited
5 NP Susan Anderson’s letter. (A.R. 29.) That letter, however, provided: “[Sallee’s]
6 condition is fragile. Though she has improved with treatment she is unable to work because
7 of her psychiatric conditions.” (A.R. 899.) This letter tends to support Sallee’s position,
8 not clearly and convincingly contradict it. And although there are other documents in the
9 record that show Sallee’s symptoms improved once she started taking medications (A.R.
10 1002, 1026), these documents are insufficient to discredit Sallee’s testimony about the
11 severity of her symptoms. The Ninth Circuit has noted that, with respect to mental health
12 conditions, “it is error to reject a claimant’s testimony merely because symptoms wax and
13 wane in the course of treatment,” as “[c]ycles of improvement and debilitating symptoms
14 are a common occurrence.” *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014); cf.
15 *Holohan*, 246 F.3d at 1205 (“That a person who suffers from severe panic attacks, anxiety,
16 and depression makes some improvement does not mean that the person’s impairments no
17 longer seriously affect her ability to function in a workplace.”). *Tidwell v. Apfel*, 161 F.3d
18 599, 601 (9th Cir. 1998), is inapposite, as there the claimant told her physician that
19 medication was helping with her physical pain and there was no evidence showing the
20 claimant was subsequently treated for this pain. Here, Sallee continued seeing providers
21 for her bipolar disorder even after telling them that her symptoms improved. The ALJ also
22 cited Sallee’s hearing testimony regarding her improvement in some symptoms of bipolar
23 disorder, but because the ALJ didn’t connect this to a discrediting of any specific testimony
24 regarding the debilitating effects of the bipolar disorder, this cannot constitute a clear and
25 convincing reason to reject Sallee’s testimony.

26 The ALJ also found that Sallee’s attempts to look for full-time employment
27 following her bipolar diagnosis were inconsistent with her disability claims. (A.R. 29-30
28 (citing A.R. 1109).) But looking for work is not a convincing reason to reject the claimant’s

1 symptom testimony, as it doesn't indicate the claimant can actually work. *Cf. Lewis v.*
2 *Apfel*, 236 F.3d at 516 (“Lewis’s willingness to work more hours was not substantial
3 evidence that he actually could work for twenty hours per week on a sustained basis.”);
4 *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995), *as amended* (Apr. 9, 1996) (“Occasional
5 symptom-free periods—and even the sporadic ability to work—are not inconsistent with
6 disability.”); *Lambert v. Berryhill*, 896 F.3d 768, 778-79 (7th Cir. 2018) (“[A] claimant’s
7 desire to work is not evidence that the claimant has embellished his limitations [T]he
8 Social Security system is designed to encourage everyone who can work to do so . . . [a]nd
9 a person who is not certain whether he will qualify for Social Security disability surely has,
10 *and should have*, a strong incentive to keep looking for work and to pursue unemployment
11 compensation as an interim source of income.”). The one case cited by the Commissioner
12 to support the ALJ’s decision, *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227
13 (9th Cir. 2009), is inapposite, as there the ALJ cited as one of many reasons for discounting
14 the claimant’s testimony that the claimant had recently worked as a caregiver for two years
15 *and* was looking for work.

16 Finally, the ALJ also noted that Sallee’s “testimony that she ha[d] worked at various
17 jobs since the alleged onset date” was inconsistent with her claims of being completely
18 disabled and unable to work. (A.R. 30.) But these jobs were “help[ing] [her] neighbor
19 water his plants for . . . \$10 every week or two weeks” or “[s]ecret shopping online” or
20 doing online customer service forms, and Sallee clarified that she did those online forms
21 only “a few times but that started getting [her] stressed out.” (A.R. 48.) “If a claimant is
22 able to spend a substantial part of his day engaged in pursuits involving the performance
23 of physical functions that are transferable to a work setting, a specific finding as to this fact
24 may be sufficient to discredit a claimant’s allegations.” *Morgan v. Comm’r of Soc. Sec.*
25 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). Here, there is no evidence in the record showing
26 that Sallee spent a substantial part of her day doing these activities; to the contrary, Sallee
27 stated she watered the plants only once every week or two and stopped doing the online
28 tasks almost immediately after trying them.

1 For the foregoing reasons, the Court concludes the ALJ unjustifiably rejected
2 Sallee's testimony concerning the symptoms of her bipolar disorder.¹

3 Additionally, the ALJ disregarded Sallee's testimony concerning the symptoms of
4 her interstitial cystitis. This is a key issue in the case because Sallee testified that this
5 condition typically causes her to use the restroom around thirteen times a day, at least five
6 of which are bowel movements, and the vocational specialist acknowledged that Sallee
7 wouldn't be able to perform the jobs of janitor or dishwasher (the two jobs identified during
8 step five of the ALJ's analysis) or any other jobs if she required "unscheduled breaks
9 throughout the workday." (A.R. 65-66.) The ALJ's order does not address Sallee's
10 testimony on this point with any specificity² and thus can't be said to contain "specific,
11 clear and convincing reasons" for rejecting it.

12 III. Scope of Remand

13 "When the ALJ denies benefits and the court finds error, the court ordinarily must
14 remand to the agency for further proceedings before directing an award of benefits." *Leon*
15 *v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). This applies particularly "[i]f additional
16 proceedings can remedy defects in the original administrative proceeding." *Garrison*, 759
17 F.3d at 1019 (citation omitted). But there is an exception to this rule, known as the "credit-
18 as-true" rule, under which the court may remand with instructions to calculate and award
19 benefits. For this rule to apply, a three-part test must be satisfied:

20 (1) the record has been fully developed and further administrative
21 proceedings would serve no useful purpose; (2) the ALJ has failed to provide
22 legally sufficient reasons for rejecting evidence, whether claimant testimony
23 or medical opinion; and (3) if the improperly discredited evidence were
24 credited as true, the ALJ would be required to find the claimant disabled on

25 ¹ The ALJ also recited all of the opinion evidence in the record in determining that
26 Sallee's symptom testimony was not consistent with the record (A.R. 30-32), but as noted
27 above, "providing a summary of medical evidence in support of a residual functional
28 capacity finding is not the same as providing clear and convincing reasons for finding the
claimant's symptom testimony not credible." *Brown-Hunter*, 806 F.3d at 494.

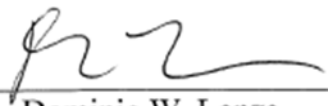
² Although the ALJ briefly addressed Sallee's interstitial cystitis in the portion of the
order analyzing step two (A.R. 26), this analysis doesn't specifically acknowledge or refute
Sallee's testimony concerning the frequency and unpredictability of her bathroom visits.

1 *Id.* at 1020.

2 Here, the credit-as-true rule isn't satisfied because further administrative
3 proceedings would serve a useful purpose. In particular, the ALJ should conduct a more
4 comprehensive analysis of whether Sallee's interstitial cystitis qualifies as a severe
5 impairment under step two and a correspondingly more comprehensive analysis of her
6 symptom testimony on that issue. The resolution of those issues may affect how much
7 weight the ALJ decides to give the opinions of the state agency consultants, as well as the
8 ALJ's consideration of whether there are jobs that exist in significant numbers in the
9 national economy that Sallee can perform.

10 Accordingly, **IT IS ORDERED** that the final decision of the Commissioner of
11 Social Security is **vacated**, and this case is **remanded** for further proceedings consistent
12 with this opinion. The Clerk shall enter judgment accordingly and **terminate** this case.

13 Dated this 19th day of February, 2019.

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17 _____
18 Dominic W. Lanza
19 United States District Judge
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